

**In the Matter of Arbitration Between
Teamsters Local 792 [Justin Rautio] and
The Pepsi Bottling Group, Inc.**

OPINION AND AWARD

FMCS Case No. 050815-05180-7

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of Teamsters Local 792
Dan Boden, Business Agent
Minneapolis, MN

On behalf of The Pepsi Bottling Group, Inc.
Robert K. Haderlein, Esq.
Kilpatrick & Stockton, LLP
Atlanta, GA

JURISDICTION

In accordance with the Collective Bargaining Agreement between The Pepsi Bottling Group, Inc., Burnsville, Minnesota and Teamsters Local 792, April 1, 2005-March 31, 2009; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above Grievance Arbitration was submitted to Joseph L. Daly, Arbitrator on March 8, 2006. [A Post-Hearing Brief was waived by The Pepsi Bottling Group and Final Argument was made at the Arbitration on March 8, 2006. Final Argument was waived and a Post-Hearing Brief was filed by the Union on March 21, 2006]. A decision was rendered by the Arbitrator on April 19, 2006.

ISSUE AT IMPASSE

The parties stipulated that the issue is:

1. Was the discharge justified? If not, what shall the remedy be?

The applicable contract provision is:

ARTICLE 19 – MANAGEMENT RIGHTS

The Company reserves the right to operate its business as necessary to meet business conditions and to be the sole judge of its required operations. Management of the plant by the Company includes, among other things, the vested right to determine the number of employees, the product to be manufactured and the kind, methods, processes and means of production and manufacturing, and the direction of the working force, including but not limited to the transfer of forces, the scheduling of hours of work, and the disciplining, *suspension or discharge of employees for proper cause*. Provided, however, subject to the terms of this Agreement. [Emphasis added].

FINDINGS OF FACT

1. On July 7, 2005, Justin Rautio received a letter from Gary Krob, one of his supervisors, stating “this letter serves as notice of suspension pending further investigation regarding inappropriate comments made at the Wal-Mart in Hastings [Minnesota]”. [Employer Exhibit No. 3]

On July 19, 2005, Mr. Rautio received a letter from Sean Helseo, Regional Human Resources Manager, for The Pepsi Bottling Group stating:

Dear Justin,

This letter serves as our notice to you regarding your employment status with Pepsi Bottling Group. Per our discussion earlier today, we have decided to end your employment with Pepsi Bottling Group effective July 19, 2005. This decision was based on your inappropriate conduct, the timing of it in relation to your previous disciplinary action for similar conduct, and our commitment to be consistent in administering progressive discipline.

If you have any questions, please feel free to call. We wish you well in your future endeavors.

[Joint Exhibit No. 4]

2. The parties agree that the basic facts are not in contention. [“The facts are not in dispute”, Closing Argument of the Attorney for The Pepsi Bottling Group]. Essentially, the termination resulted from a conversation which Mr. Rautio had with two employees at the Wal-Mart store in Hastings, Minnesota while he was performing his duties of filling a Pepsi machine on the premises in the Wal-Mart employees’ lunch room. The Wal-Mart employees were Bev Peine and Kevin [no last

name from the record- the Manager of the Wal-Mart store]. All parties agree that the conversation essentially took place this way:

Bev Peine to Justin.

I don't buy anything out of those pop machines, it's too expensive I bring it from home.

Justin.

That's Ok I don't buy anything from Wal-Mart.

Bev Peine's question to Kevin.

Hey Kevin did you hear that? He doesn't buy anything from Wal-Mart.

Kevin's question to Justin.

What do you mean you don't buy anything from Wal-Mart, everyone buys from Wal-Mart. Why don't you?

Justin responds to Kevin.

I would (buy at Wal-Mart) if they took better care of you guys on the medical coverage. You guys are the largest company in the US with the most people on medical assistance.

Kevin questions Justin further.

So where did you hear that?

Justin responds.

I just read it somewhere.

Kevin comments.

Well we don't just get everything handed to us because we are not union.

Justin responds.

We pay good money for what we get. The only one I ever heard getting into Wal-Mart was in Canada and they closed the door before it opened.

Kevin response.

Well that's because they are Canadian.

[Post-Hearing Brief of Union at Page 2, emphasis in original]

3. Mr. Rautio has a previous discipline and Corrective Action Report. [Employer Exhibit No. 4]. The Corrective Action Report, dated December 16, 2004, described the incident as:

Mr. Rautio was accused of conduct and verbal communication to the employees of PBG customers that was unprofessional and vulgar. These accusations were in some cases corroborated and, to some extent admitted by Mr.

Rautio (PBG does not reach a conclusion as to whether this conduct reached a level of actionable conduct as sexual harassment under Title VII of the Civil Rights Act.)

Mr. Rautio was accused of verbal statements that implicate a violation of the duty of loyalty by including vulgar public disparagement of the Company.

[Id.]

As a result of the December 2004 incident, Mr. Rautio was put on a “Last Chance Agreement” which stated in its entirety:

This agreement is entered into between the Pepsi-Cola Bottling Group—Burnsville (“PBG”) , Teamsters Local 792, and PBG employee Justin Rautio.

Justin Rautio and Teamsters Local 792 hereby recognize that Mr. Rautio’s conduct could serve as grounds for immediate termination of his employment with PBG.

But, based on certain mitigating factors, the Company is willing to provide Mr. Rautio this LAST CHANCE:

From the date of his return to work on December 16, 2004 and for the next six (6) months, any infraction of any Company rule, guideline, procedure or policy will result in the immediate dismissal of Mr. Rautio from employment with PBG.

Mr. Rautio and Teamsters Local 792 hereby acknowledge that the terms of this agreement are reasonable and the duration of these terms is reasonable.

This agreement cannot be modified except by a written document executed by the Parties.

[Id. at Page 2, emphasis in original]

4. The Pepsi Cola Guidelines of Conduct state in their entirety:

PEPSI-COLA GUIDELINES OF CONDUCT

Group I

1. No employee shall be allowed to drink, be in possession of, or be under the influence of alcoholic beverages, or drugs during working hours or on company property. Non-compliance may result in your immediate dismissal.
2. Any type of theft may result in immediate dismissal.
3. Disorderly conduct, including fighting or dangerous horseplay, is not allowed.

4. Deliberate or malicious damage to, destruction of, or deliberate misplacement of property belonging to the company or any of its employees could result in outright dismissal.
5. Falsification of any personal or company records could result in outright dismissal.
6. No employee shall remove any company property from the plant without proper authorization.
7. Possession of firearms or weapons on company property is strictly prohibited without written permission.
8. All sales, both on route and cases to be taken off company premises, must be accompanied by a sales ticket.
9. No hourly employee is allowed to punch the time card of any other employee nor deliberately fail to punch their own card.
10. No riders other than company employed are allowed in company vehicles.
11. Drivers involved in three preventable accidents within one year may be subject to discharge.*
12. Drivers involved in one preventable accident which is attributed to a flagrant violation of laws, or a deliberate and flagrant misuse of vehicles will be subject to discharge.*
13. Insubordination will be a dismissal offense.

“A driver is defined as anyone who operates a vehicle. This includes route salesman, forklift operators, loaders, mechanics or anyone else operating a vehicle. A preventable accident is one in which a driver failed to do everything possible to avoid the incident, even if the claimant is 98% at fault. Preventability is not based on whether a claim is paid or whether the driver was reimbursed for his losses or whether he was legally in the right, but did he do everything possible to avoid the accident. If not, he must then be held responsible and charged accordingly.

Group II

1. Sleeping on the job is prohibited.
2. Gambling on company property is prohibited.
3. Unexcused absence or excessive tardiness can result in dismissal. Department management will determine what is unexcused.

4. Use of company vehicles are restricted to a direct route to and from each route salesman's area. Personal use (i.e., breakfast, lunch) should not exceed one mile to and from said direct route and must be reasonable in duration.
5. Each route will be pulled in accordance with the schedule outlined by the route book for that day. Changes can be made with the approval of the route manager. Servicing of accounts is expected to be done in an efficient and timely manner as directed by the supervisor.
6. Each route card in a route book must be marked daily for sales made.
7. All special call-in orders must be serviced the day of receipt unless otherwise specified.
8. All accounts must be serviced a minimum of once a week or as otherwise directed. An account that is deliberately skipped could result in the outright dismissal of the route salesman.
9. All monies received on a route must be accounted for each day. Cash advances are not permitted.
10. No merchandise will be sampled without prior authorization from a route manager or sales manager.
11. Based on the knowledge that the job of a route salesman consists of selling and delivering merchandise, acquiring all possible new accounts, building displays, placing appropriate advertising and otherwise generally promoting the sales of our products, all CR's must remain on their respective routes until same is satisfactorily completed each day.
12. After returning to the plant, all hourly employees will complete all necessary paperwork, punch out and depart from company premises in a timely and efficient manner.
13. All hourly employees are entitled to specified break periods to be adhered to and taken in their own area.
14. All hourly employees will report to work by the posted time for sales meeting on days that sales meetings are scheduled. Merchandisers must depart on a timely basis after conducting their pre-trip inspection each day. If an hourly employee is unable to report to work, his supervisor must be notified on a timely basis at least one hour prior to the specified starting time.
15. Employees will be required to take part in all phases of safety training that will be scheduled for them. Safety training will be a part of their job responsibility.
16. CR's are required to operate their two wheeler safely at all times. Any accident will be handled and administrated the same as a vehicle accident.

17. In case of an accident, involving property or equipment on Pepsi-Cola premises all pertinent information dealing with the accident should be recorded. This information should be relayed to their direct supervisor and communicated to the distribution department.

In case of an accident, involving a vehicle belonging to Pepsi-Cola the driver of the vehicle should fill out all information at the scene with the accident report kit. **Any accident or personal injury** should be reported to their direct supervisor. Drivers are required to take post accident drug test within 12 hours if one or all of these situations occur:

- Death of an injury
- Injury to a person requiring immediate treatment away from the scene of the accident.
- Estimated or actual total damage of \$2,000. or more.
- If a driver receives a citation for a moving traffic violation arising from the accident.

Drivers or CR's are required to notify their district manager of any accident or personal injury immediately and fill out the proper forms upon returning to the plant. If you are unable to return to the plant, these forms must be filled out within 24 hours. CR's must notify the mechanics when a truck is involved in an accident and have it checked by the mechanic on duty.

18. Evening sales meetings must be attended by all CR's on the dates specified. Said meetings will be held not more than once each month.
19. Each salesman must call voice mail twice a day and check in with City Desk daily.
20. Drivers (i.e., CR's, supervisors, mechanics, merchandisers, etc.) will be required to obey all federal, state, and local traffic enforcement laws, such as, but not limited to posted speed limits, stop and yield signs, D.O.T. cards, etc. Employees must observe all posted speed limits and signs on company property.

Group III

1. CR's will report to work by the posted time for sales meetings on days that sales meetings are scheduled. CR's must report to work, be checked, and have departed the building by 8:00 a.m. on all other days. If a salesman is unable to report to work, his route manager **must be notified** by 6:45 a.m.
2. Employees are not permitted to enter company premises except on official business in line with their company duties.
3. Tools issued to personnel, including those for fleet maintenance and machinery maintenance, will be replaced by the person involved if damage or loss is attributed to carelessness or negligence, this also includes two wheelers.
4. All keys issued will be protected with maximum care and effort.

5. All employees will exercise professional conduct while performing company business.
6. Where required, all personnel shall wear the prescribed uniform. Same is to be neat and clean each morning. Each employee shall be neat and well groomed. Sound judgment should be used when wearing the company uniform.
7. Idling of trucks is strictly forbidden, whether attended or unattended, unless informed otherwise due to weather or mechanical problem.
8. Company vehicles are not allowed in unauthorized area without specific management approval.
9. Safe practices.

Group I

First Violation: Subject to immediate suspension/dismissal.

Group II

First Violation: Written warning.

Second Violation: Written warning and subject to suspension/dismissal.

Third Violation: Written warning subject to dismissal.

Group III

First Violation: Verbal warning.

Second Violation: Written warning.

Third Violation: Written warning subject to suspension.

Fourth Violation: Written warning subject to dismissal.

All warnings are cumulative in nature.

A rolling twelve month calendar will be used for discipline administration. Any warnings in excess of twelve months will not enter into consideration for cumulative discipline.

This list is not all inclusive as to any rule infraction. Management reserves the right to administer discipline reasonably and uniformly as circumstances dictate.

[Union Exhibit No. 5, emphasis in original]

5. The Pepsi Bottling Group contends that Mr. Rautio's violation was a Group I violation that by making such offensive comments to two people at Wal-Mart, Mr. Rautio destroyed the relationship between Pepsi Cola Bottling Group and the customer. That by "opening his big mouth and

saying such things, he offended Pepsi's customers". [Closing argument of Pepsi's Attorney at Arbitration hearing]. That these were "offensive comments" which were of a similar nature to the discipline he received in December 2004. These inappropriate comments while "out in the trade" caused harm to The Pepsi Cola Company. "The Company was more than justified in terminating Mr. Rautio. He made bad judgments using such critical comments to the Wal-Mart employees". [Id.] Based on "progressive discipline", the termination was proper.

6. The Union essentially argues:

a. The Company failed to prove that the Wal-Mart employees, who themselves engaged Mr. Rautio in the Wal-Mart break room discussion, were egregiously offended. This was nothing more than a daily conversation. . . . The content, demeanor and communication and the evidence of the case upholds the Union's position that inappropriate conduct did not take place.

b. The Company sought to apply Justin's previous employment records outside the required structure and context of the Rules of Conduct. We find the Wal-Mart discussion was distorted by the Company so as to utilize progressive discipline.

c. The Company failed to fully investigate all witnesses. In addition, witnesses' statements are not consistent. [Post-Hearing Brief of Union at Page 1].

7. The Company did not call any Wal-Mart witnesses during the Arbitration hearing. Rather, the Company used the written statement from Bev Peine which stated in its entirety:

"Kevin and I were talking about pop. The Pepsi man started talking about how he would not buy from Wal-Mart, because we are not paid enough know [sic] benefits for our people. He was very upset, I left then." [Bev Peine-Employer Exhibit 2];

And, the statement from Kevin [no last name] which stated in its entirety:

"It started when Bev said that she never bought a pop out the vending machine in the break room before. Then he said, "That's all right, I never bought anything from Wal-Mart before." Then I said, "You never bought anything from Wal-Mart". He then said he would not buy anything from Wal-Mart until they treat the associates better. He then stated talking about how bad Wal-Mart health plans are,

and that more people request gov't assistance for health care. Talked about Canada Wal-Mart closing because it wanted to be Union." [Kevin-Employer Exhibit 1]

DECISION AND RATIONALE

Contrary to Ms Peine's written statement [Employer Exhibit 2], Mr. Rautio testified he was "not angry or upset" during the 45-second conversation. Rather, he testified he was "simply responding to Bev Peine's comment that she doesn't 'buy anything out of those pop machines, it's too expensive'" [Testimony of Mr. Rautio at Arbitration Hearing]. Ms. Peine did not testify at the Arbitration hearing. The Union argues "Justin Rautio intended no malice in his conversation with Wal-Mart employees. This was merely a free expression of ideas. There was nothing contentious or hardened said here." [Post-Hearing Brief of Union at Page 5]. The Union further contends that the December 16, 2004 "Last Chance Agreement" stated "from the date of his return to work on December 16, 2004 and for the next six (6) months, any infraction of any Company rule, guideline, procedure or policy will result in the immediate dismissal of Mr. Rautio from employment with PBG". [Employer Exhibit No. 4]. The Union contends the Last Chance Agreement had expired by July 5, 2006 the date of the conversations at Wal-Mart.

The Company also contends that the termination is proper because it was progressive discipline after the suspension in December of 2004. The Union answers by saying "there is no link between this July 5, 2006 discussion and what previously took place on December 16, 2004". [Post-Hearing Brief of Union at 5].

The Pepsi Bottling Group is understandably concerned about maintaining good relationships with its customers. Good relationships can add to sales. Business relationships are important. Competition is intense. The Pepsi Bottling Group does not want its own employees to "bad mouth" its customers. "Inappropriate comments" about a customer can destroy a business relationship. Justin Rautio, a full-service representative, represented The Pepsi Cola Bottling Group at Wal-Mart. If Mr.

Rautio's comments violated the Pepsi-Cola Guidelines of Conduct then perhaps progressive discipline would permit discharge in this case.

So the question becomes, was Mr. Rautio's comments "inappropriate conduct" in violation of the Pepsi-Cola Guidelines of Conduct as stated in his termination letter of July 19, 2005? [See Joint Exhibit No. 4].

The entire conversation took less than one minute. The conversation was initiated by a Wal-Mart employee when she stated "I don't buy anything out of those pop machines, it's too expensive, I bring it from home". Mr. Rautio responded "That's okay, I don't buy anything from Wal-Mart". Then the Wal-Mart employee brought another Wal-Mart employee [Kevin—the Store Manger] into the conversation by stating "Hey Kevin did you hear that? He doesn't buy anything from Wal-Mart". Kevin's question to Mr. Rautio was "What do you mean you don't buy anything from Wal-Mart, everybody buys from Wal-Mart. Why don't you?" Then Mr. Rautio responded, truthfully and factually, to Kevin's question.

A close analysis of this conversation does not show "inappropriate comments" by Mr. Rautio. It shows his political thinking; it shows his response to the question asked of him by Kevin, the Wal-Mart Store Manger. The fact that the Wal-Mart employees did not like Mr. Rautio's response to the Wal-Mart employees' own comments and questions does not mean that Mr. Rautio's comments were "inappropriate". There is no nexus between the content of the discussion between Mr. Rautio and the Wal-Mart employees and "proper [just] cause" for the termination [See Article 19 of the Collective Bargaining Agreement]. The fact that Wal-Mart no longer wants Mr. Rautio on its property to make delivery services does not mean automatically mean that Wal-Mart's reaction makes Mr. Rautio's comments "inappropriate". Evidence offered at the Arbitration hearing shows that other Pepsi workers have been removed from delivery accounts for various reasons without the Pepsi employee being disciplined.

The evidence offered at the Arbitration hearing by the employer does not add up to a preponderance of the evidence to justify a “proper [just] cause” termination. The evidence does not add up to just cause for any discipline.

Mr. Rautio’s grievance is sustained. He will be immediately returned to his job and made whole for all his losses. All other employment income earned and unemployment compensation received by Mr. Rautio shall be set-offs. The grievance is sustained.

Dated: April 19, 2006.

Joseph L. Daly
Arbitrator